OFFICE OF THE COUNTY ATTORNEY MONTGOMERY COUNTY, MARYLAND

No.	74.	140
110.	17.	TAU

Date_September 13, 1974

TO:

Ronald G. Lloyd, Personnel Director

FROM:

Richard S McKernon, County Attorney

OPINION:

The County presently has the legislative authority to "meet and confer" with representatives of County employees, but does not have the authority to enter into binding collective bargaining agreements. The Council has authority to legislate in the field of labor relations, subject to limitations.

You have requested the opinion of this office as to whether or not the County can promulgate an administrative policy of procedure setting forth on a formalized basis policies dealing with employee labor relations. Additionally, you have inquired as to whether the County, through its legislative processes, can pass legislation in the area of employee labor relations. You have indicated that a first step in this process might be the establishment of a "meet and confer" relationship with employee group representatives; as you envision it, the specifics of such a policy would be:

- Provision for procedures of determining exclusive meet and confer groups;
- 2. Provision for meeting and confering in good faith on specific issues not in conflict with existing State and County legislation;
- 3. Provision for dues collection and the procedures under which such collection will be provided;
- 4. Provision for good faith bargaining culminating in a memorandum of understanding;
- 5. Provision for third party resolution of impasses;

6. Provision for legal recourse in the event of unfair labor practices by either party.

It is the opinion of this office that the County, under its current legislative authority, can establish a "meet and confer" arrangement with representatives of County employees. However, due to the absence of State-enabling legislation, the County is prohibited from entering into binding collective bargaining agreements with such representatives.

There now exist several pieces of legislation which deal with the County's authority in the areas of employee/personnel regulations and rights. Section 5(Q) of Article 25A of the Annotated Code of Maryland (1973 Repl. Vol.) provides the general enabling legislation for the County to establish a merit system. Section 5(Q) states, inter alia, as follows:

"To provide for the appointment and removal of all county officers except those whose appointment or election is provided for by the Constitution or public general law, and to establish a merit system, if deemed desirable, in connection with the appointment of all county officials and employees not elected or appointed under the Constitution and the public general laws . . . "

The Charter of Montgomery County, Maryland (1968). has three sections which are relevant to this opinion. 401 directs the County Council to prescribe by aw a merit system for all officers and employees of the County government except certain appointed officials. Section 401 expressly states that "[s]alaries and wages of all classified employees in the merit system shall be determined pursuant to a uniform salary plan." Section 402 indicates that the Chief Administrative Officer, under the direction of the County Executive. has the responsibility for the administration of the County's merit system. Section 404 authorizes the County Personnel Board to adopt regulations, subject to the approval of the County Council, covering all positions of the merit system and, specifically, establishing minimum qualifications for such positions, methods of determining such qualifications, methods of selection for such positions, probationary periods, promotions, transfers, causes for removal and methods of removal, including demotions, furloughs, and reduction of staff,

annual, sick and other leave, prohibitions against political activity, maintenance of personnel records, and "similar personnel matters." Section 404 also authorizes the Personnel Board to prepare and recommend to the Council a system of retirement pay.

Section 33-5(1) of the Montgomery County Code 1972, as amended, sets forth the general purposes and definition of the County's merit system. Section 33-5(1) states, in part, as follows:

"The general purpose of this chapter is to establish regulations not in conflict with the Charter of Montgomery County to implement a system of personnel administration that meets the social, economic, and program needs of the people of Montgomery County based upon merit principles and facilitates the organizational and program objectives of the county government. These regulations provide for the appointment, advancement and retention of employees on the basis of merit and fitness to be ascertained in most cases by competitive examination without regard to sex, marital status, race, religion, national origin, or political affiliation."

Article 25A of the State Code, the County Charter, and Chapter 33 of the County Code constitute the complete set of legislative enactments vesting discretionary authority in various officials of Montgomery County in the areas of personnel and employee matters. These enactments give the County's full discretionary authority over employee issues to the County Executive, the County Council or the Personnel Board of Montgomery County, in their distinct, but complementary, The leading case in Maryland on the issue of a municipal corporation's right to enter into collective bargaining agreements with its employees is Mugford v. City of Baltimore, 185 Md. 266 (1945). In the Mugford case, the City of Baltimore had entered into a collective bargaining agreement with a local union representing Department of Public Works' employees. Taxpayers of the City of Baltimore sued the City, alleging that the agreement was null and void and beyond the authority of the City to execute. The lower court had declared that the

agreement was null and void because it gave preferential advantages to some employees over other public employees of the City. The lower court also held that the collection off union dues through the City's payroll system could be accomplished if done on a purely voluntary basis, terminable at any time at the discretion of the employee. Neither the union nor the City appealed the part of the lower court's decision which declared the collective bargaining agreement ultra vires, and the only issue before the Court of Appeals of Maryland was the lower court's decision regarding the union dues checkoff. However, the Court of Appeals indicated that it would have agreed with the lower court had the issue of the validity of the collective bargaining agreement been before it. The Court of Appeals stated the following, at pages 270 and 271:

"To the extent that they [hours, wages and working conditions of employees] are left to the discretion of any City department or agency, the City authorities cannot delegate or abdicate their continuing discretion. Any exercise of such discretion by the establishment of hours, wages or working conditions is at all times subject to change or revocation in the exercise of the same discretion . . .

* * *

The City has no right under the law to delegate its governing power to any agency. The power of the City is prescribed in its charter, and the City Charter constitutes the measure of power that is possessed by any of its officials. To delegate such power to an independent agency would be a serious violation of the law."

In a recent opinion dated July 23, 1974, (The Daily Record, August 6, 1974, Page 4), the Attorney General of Mary-land reviewed the legal status of the Memorandum of Understanding entered into between the Baltimore City Police Commissioner and the local union group representing certain police officers. After a discussion of the Mugford case, the Attorney General concludes that "[a]ccordingly, we are compelled to conclude that the Memorandum of Understanding cannot be considered a binding commitment insofar as it touches any power or authority vested in the Police Commissioner by the Omnibus Act . . .

The Police Commissioner may delegate supervisory duties but cannot irrevocably divest himself or be divested of any management function or prerogative. To the extent that the Memorandum of Understanding purports to bind the Police Commissioner, it must be considered ineffective as an abridgement of his statutory powers." In the last paragraph of his opinion, the Attorney General appears to take the position that the only way such binding collective bargaining authority could be vested in any municipality or municipal official would be through State enabling legislation from the Maryland General Assembly, which the Attorney General notes has only been given with respect to representation of public school employees under Chapter 14 1/2 of Article 77 of the Annotated Code of Maryland.

Although the <u>Mugford</u> decision, the above-cited Attorney General Opinion and the <u>lack</u> of enabling legislation from the General Assembly would at this time preclude the County from entering into binding collective bargaining agreements with County employee representatives, it is the opinion of this office that non-binding "meet and confer" discussions with employee representatives would be permissable under the current status of the law. This "meet and confer" authority is recognized in both the Mugford decision and the Attorney General's Opinion, conditioned upon the fact that no binding agreement The Court of would be entered into between the parties. Appeals in Mugford, supra, stated that although the City authorities could not delegate or abdicate their continuing discretionary functions. "it by no means follows that employees may not designate, a representative or spokesman to present griev-185 Md. at 270. In the same vein, the Attorney General indicated that "[c]oupled with our advice that the Police Commissioner was not empowered to enter into a collective bargaining agreement with a labor union, we said that he was authorized to discuss terms and conditions of employment with a union representing members of the Police Department provided that he did not enter into a binding agreement."

It is the opinion of this office that the County currently has the authority to promulgate an administrative policy or procedure setting forth on a formalized basis policies dealing with labor relations, provided that they conform to the principles set forth in the Mugford case and the Attorney General's

Opinion cited above. If it is determined that the County would prefer to establish such policies and procedure through the format of legislation rather than administrative policy or procedure, then it is the opinion of this office that the County does have the authority to enact a local law to this effect. Although Section 5(Q) of Article 25A of the Annotated Code of Maryland speaks only of the establishment of a merit system, it is our opinion that the County's broad police powers, recited in Section 5(S) of Article 25A and reaffirmed in the recent Court of Appeals' case of County Council v. Investors Funding, 270 Md. 403 (1973), gives the County this authority as enactment of a law "deemed expedient in maintaining the . good government . . . of the county." It is our view that such an enactment should be placed as a new chapter in the Montgomery County Code because the scope of Chapter 33, title "Personnel," of the Code is limited to provisions dealing with the County's merit system and individual employee rights and grievances, as opposed to employee group concerns and Needless to say, any such legislation would necessarily have to conform to the principles set forth in the Mugford decision and the above-referenced Attorney General's Opinion.

In the beginning of this opinion, we recited six specifics which you indicated might constitute the "meet and confer" arrangement envisioned as an initial step to a County labor relations program. The first of these specifics is provision for procedures for determining exclusive meet and confer groups. Since the opinion of this office is that the County cannot now enter into binding collective bargaining agreements, it would appear that the need to establish and recognize exclusive bargaining groups is not pressing at this If the County were obligated to negotiate and agree with representatives of County employees, then the importance of negotiating a limited number of contracts with a limited number of groups would be apparent. However, this is not the case in a meet and confer group program. It is also the opinion of this office that the impetus for establishing exclusive bargaining units should come from the employees, rather than the management of the County, if the private business sector is to be looked to for examples of this process.

The second specific which you relate is the provision for meeting and conferring in good faith on specific issues not in conflict with existing State and County legislation. This office has several problems with this item. The first is that

the provision for bargaining in "good faith" creates a presumption that the County would bargain otherwise. In addition, if either side failed to bargain in "good faith", there would be no sanctions to force correction of such behavior in a meet and confer arrangement, so that the inclusion of the "good faith" language would serve no purpose. However, if the designation of specific issues is desired, then it should be clearly stated that the issues specified could be enlarged or curtailed at the discretion of the County and that any discussions surrounding such issues would be purely for the purpose of non-binding deliberations.

The third specific related by you would be the provision for dues collection and the procedures under which such collection would be provided. It appears from Mugford, supra, that such dues checkoff provisions would not be inconsistent with the principles of merit system government and the discretionary powers of County officials. However, the Mugford Court conditioned use of this procedure on its permissibility under the general regulations applicable to the City of Baltimore's payroll system and on the voluntary request of the employee for this deduction. In addition, the Court indicated that the withdrawal of employee permission for dues deduction would have to be completely discretionary with the individual employee. See also Rockville v. Randolph, 267 Md. 56, 62-63 (1972).

The fourth, fifth, and sixth specifics mentioned in your memorandum to us concern the provision of good faith bargaining culminating in a memorandum of understanding, provision for third party resolution of impasses, and provision for legal recourse in the event of unfair labor practices by either party. It is the opinion of this office that all three of these items are outside the scope of the "meet and confer" system proposed at this time, as well as being in derogation of the principles established by the Mugford case. It is our understanding that, unlike the collective bargaining process, the meet and confer system contemplates non-binding discussions between parties unequal in bargaining power. A memorandum of understanding agreed to through the process of non-binding discussions would be permissible under the meet and confer system, however, so long as the memorandum of understanding did not purport to be a binding commitment on the County in areas (such as hours, wages, or working conditions) which are by law discretionary with County officials. However, the third party resolution of impasses and provision for legal recourse in the event of unfair

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labor practices are two specifics which could not be provided for in a meet and confer system memorandum of understanding in that they would constitute a unlawful delegation of authority under the Mugford decision, since the only purpose of such provisions would be if they were binding in nature on the parties.

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